Nos. 12,618 and 12,619

IN THE

United States Court of Appeals

For the Ninth Circuit

MOLLY A. HARKNESS, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 12,618
	(CONSOLIDATED CASES)
FLOYD J. HARKNESS, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 12,619

PETITION OF PETITIONERS MOLLY A. HARKNESS AND FLOYD J. HARKNESS FOR A REHEARING.

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PETITION OF PETITIONERS MOLLY A. HARKNESS AND FLOYD J. HARKNESS FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

This Honorable Court, by its decision and opinion filed on December 28, 1951, affirmed the decisions of the Tax Court in the above-entitled causes.

This petition does not reargue the issues determined by the opinion. The purpose of this petition is to call attention to material matters of fact and law inadvertently overlooked by this Court, as shown by its opinion (*Millslagle v. Olson* (1942, CCA 10), 128 F. (2d) 1015, 1016). Petitioners, therefore, respectfully call attention to, and submit as reason for granting their petition for a rehearing, the following material matters of law and of fact inadvertently overlooked by the Court:

I.

IN THESE CASES THE RESOLUTION OF THE ISSUE WHETHER THE HARKNESS CHILDREN WERE THE "TRUE OWNERS" OF CAPITAL CONTRIBUTED TO THE PARTNERSHIP WAS DECISIVE OF THE QUESTION OF "INTENT". THIS ISSUE COULD BE RESOLVED ONLY BY APPLYING TO THE FACTS THE DEFINITIONS OF "TRUE OWNERS" SET FORTH IN THE CLIFFORD, HORST AND TOWER CASES.[1] THE TAX COURT MADE NO FINDING ON THE ISSUE OF "OWNERSHIP". THE TAX COURT'S FAILURE TO SO FIND WAS CALLED TO THE ATTENTION OF THIS COURT, AND THIS COURT WAS REQUESTED TO REVIEW THE RECORD IN THE LIGHT OF THE DEFINITIONS CONTAINED IN THE ABOVE CASES IN DETERMINING WHETHER THE ULTIMATE FINDING OF THE TAX COURT WITH RESPECT TO "INTENT" WAS SUPPORTED BY SUBSTANTIAL EVIDENCE. THIS COURT DID NOT SO REVIEW THE RECORD.

Briefly stated, the reasoning of this Court in upholding the decision of the Tax Court is as follows:

Harkness "looked forward to having the assistance not only of the son, but of the son-in-law". But

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[1] *Helvering v. Clifford* (1939), 309 U.S. 331, 84 L.Ed. 788; *Helvering v. Horst* (1940), 311 U.S. 112, 85 L.Ed. 75; *Commissioner v. Tower* (1945), 327 U.S. 280, 90 L.Ed. 670.

Harkness knew that he could not have, and, in fact, did not receive the desired assistance *during 1943,* the tax year in question. Therefore, Harkness did not intend that the partnership should become effective until "the desired help of the young men would become available".

Petitioners have no quarrel with the premises adopted by the Court. The partnership agreement, the supplemental agreement of January 4, 1943 (R. 258-269), and the testimony of the parties clearly show that everyone concerned knew that the young men would not be able to render services until their release from the Army. Petitioners, however, do contest the validity of the conclusion reached by the Court from these premises.

This conclusion is obviously at odds with the record and the applicable decisions. The record shows formal, *unconditional* conveyances of real and personal property made by the petitioners to their children in *1943* (R. 257-258; 261-262; 269-270). Certainly, if the children became, as a result of these conveyances, "true owners", *in 1943,* of the property contributed to the partnership, as that term is defined in the *Clifford, Horst* and *Tower* cases, supra, then under the doctrine of *Commissioner v. Culbertson* (1948), 337 U.S. 733, 748, 93 L. Ed. 1639, 1668, there was an intent that the children be partners in the business in *1943,* and the fact that the son and son-in-law did not render services during that year, is immaterial under the circumstances shown by this record.

The Tax Court found that during the year *1943* there was no change in the operation of *United Packing Co.* over prior years, and that the business was still completely under the control of Harkness, Sr. (R. 270). It may be argued from these findings that the powers exercised by Harkness in some manner detracted from the children's "true ownership" of the capital contributed to the partnership. However, this argument cannot be made because the Tax Court did not find that Harkness, Sr., exercised the powers thus given to him, not in his fiduciary capacity, as representative of the absent partners, but as owner and as manager of the community. The absence of such a finding is fatal to any contention that the children were not the "true owners" of the real and personal property conveyed to them during the year *1943*.

The Courts and Congress have both recognized that so long as the powers of management are exercised by the transferor of property in an intra-family transaction as a fiduciary, and not as owner, the exercise of such powers in no way detracts from the *bona fides* of the transaction. In support of this statement we cited in our opening brief the case of *Greenberger v. Commissioner,* (C.A. 7, 1949), 177 F. (2d) 990, 994. Congressional recognition has been given to this principle in the House Report accompanying the Revenue Act of 1951. There, the House Ways and Means Committee said:

> "Not every restriction upon the complete and unfettered control by the donee of the property

donated will be indicative of sham in the transaction. Contractual restrictions may be of the character incident to the normal relationships among partners. Substantial powers may be retained by the transferor as a managing partner or in any other fiduciary capacity which, when considered in the light of all the circumstances, will not indicate any lack of true ownership in the transferee. *In weighing the effect of a retention of any power upon the bona fides of a purported gift or sale, a power exercisable for the benefit of others must be distinguished from a power vested in the transferor for his own benefit.*" (Emphasis supplied.)

H.R. No. 586, 82d Congress, 1st Session, p. 33.

It is apparent, therefore, that the conclusion of this Court upholding the decision of the Tax Court results from a failure to consider the facts with respect to these conveyances, and from a failure to test the reality of these conveyances under the definitions set forth in *Clifford, Horst* and *Tower,* supra. In the absence of anything in this Court's opinion explaining this Court's failure to consider these vital facts and the applicable law, we must hazard that this resulted either from inadvertence or from certain unexpressed, invalid assumptions.

If not the result of inadvertence, then the conclusion reached by this Court requires the tacit assumption that petitioners had attached to these formal and *unconditional* conveyances a hidden and unexpressed condition precedent which rendered the chil-

dren's interest in the property conveyed merely contingent and not vested. Of course, if this Court or the Tax Court indulged in such an assumption, there could be no good reason for applying the tests ordained by *Clifford, Horst* and *Tower,* supra. However, such an assumption, it must be conceded, can only be based on suspicion and surmise. There is implicit in this assumption a suspicion that no man in his right mind, particularly a father, would give to his children property without making sure—first—that he got what he bargained for. There is likewise implicit in this assumption surmises as to what Harkness, Sr., might have done had he been unable to secure the desired assistance of his son and son-in-law for any reason, including death, disability or a change in heart as to a career. It could be surmised that in the event, disability or failure to render desired assistance because of some other cause that Harkness, Sr., would have sought to recapture from his children or their heirs either the property conveyed or the income derived therefrom, or both. It could likewise be surmised that Harkness, Sr., had in case such an event came to pass, extracted from his children a secret promise to reconvey to him the property or the income, or both. Fortunately, under our system of jurisprudence, findings may not be based on surmises or suspicions.

The idea that there may have been a suspensive condition which prevented the vesting of the property in the children would be, of course, a palpable afterthought. At the time these causes were tried

(January 11, 1949)[2] and briefed before the Tax Court, the Respondent and certain Judges of the Tax Court were proceeding on the theory that the absence of vital services and original capital, without more, rendered all family partnerships ineffective for tax purposes. The Respondent based his notices of deficiencies herein on this theory (R. 272), and the Attorney representing the Respondent at the trial of these causes, upon making his opening statement, stated that his case was based on this theory (R. 101-102). There was, therefore, no reason at the time these causes were tried to make any inquiry respecting any condition precedent that might have been attached to the conveyances, and, in fact, no attempt was made by counsel or the Tax Court to elicit any evidence which might have disclosed such a condition, or from which an inference as to such a condition might have been drawn.

Commissioner v. Culbertson was decided after these causes had been tried and briefed, but before the deficiencies determined by the Respondent herein had been affirmed by the Tax Court. The decision of the Supreme Court in *Commissioner v. Culbertson,* as is conceded, entirely destroyed Respondent's original theory of the case, and the Tax Court was compelled to decide these causes on a theory other than the one which merely called for the mechanical application to the record of the "vital services—original capital" test. The Tax Court, therefore,

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[2] R. 82.

evolved herein, for the purpose of affirming the Respondent's determination of deficiencies, the theory of a hidden condition precedent which would make ineffectual the unconditional conveyances of property made by petitioners to their children in 1943. This device enabled the Tax Court to avoid the duty cast upon it by the Supreme Court of making a finding with respect to "intent" based on the resolution of the issue whether the children were the "true owners" of the property contributed to the partnership.

The theory thus evolved enabled the Tax Court to state that there was "an indefinite *future* plan to operate United Packing Co. as a genuine partnership." This theory and this statement both have their origin in the first Culbertson decision (*Culbertson v. Commissioner* (1947), 6 TCM 692). There, the Tax Court found on the basis of *express conditions* set forth in written instruments that the children were "to acquire an interest in the business in the *future* * * *." (6 TCM 700). To show that it is not possible to compress the record herein into the "future" plan mold of the *Culbertson* case, it is necessary to make brief reference to the facts of that case and to accompany it on its peregrination from the Tax Court to the Supreme Court.

The record of the *Culbertson* case shows that Mr. and Mrs. Culbertson owned certain community property used in a cattle business. They had five children—four sons and a daughter. In late October or November of 1939, Mr. and Mrs. Culbertson entered into an oral agreement of partnership with their sons.

On November 6, 1939, the Culbertsons executed a bill of sale in favor of their sons covering a one-half undivided interest in a herd of cattle. On January 1, 1940, at the beginning of the first taxable year, the sons were 24, 22, 18 and 16 years of age, respectively. The daughter was then 14 years old. The oldest son worked in the parents' business and the others were engaged in acquiring an education.

In December, 1939, Culbertson made application to a lending institution for a loan of funds with which to conduct the operations of his business. At that time, he informed the manager of the institution of the oral agreement of partnership with his minor children. Upon learning these facts, the manager advised Culbertson to have prepared some kind of document which would qualify him to do business on behalf of the minors. Pursuant to this advice Culbertson had an attorney prepare such a document. This document was executed on December 8, 1939, to be effective January 1, 1940. The Culbertsons purported by this instrument to create a limited partnership with their sons and to convey to them undivided interests in their property. The language disclosed that the conveyance of property to the sons was entirely conditional and that the Culbertsons retained every incident of ownership.

The document recited that the limited partnership was formed and the conveyance was made because the parents desired to establish the sons "in business, *as and when they arrived at a proper age to engage in business,*" and to induce them "after they

reach such a state of maturity, to contribute their time and services in building up and establishing a common family estate."

Under the terms of this instrument, the parents reserved unto "themselves the sole and exclusive right and control and management of such properties herein conveyed * * * *until the time the youngest of our said sons living shall have arrived at the age of twenty-one years."* The parents likewise reserved to themselves the right to manage without any restriction and without obtaining the verbal or written consent of the sons.

The instrument also provided that the sons would have no right to enjoy in any manner the interests allegedly conveyed until the youngest had reached the age of twenty-one.

The above-described document was executed without the knowledge of the four sons, and the oldest of them did not learn of its existence until some time after May, 1943.

On or about December 31, 1940, Mr. and Mrs. Culbertson executed another document whereby they purported to convey to their fourteen-year-old daughter an undivided interest in their business. This instrument made direct reference to the one executed in favor of the sons, and expressly recited that under its terms *"conditional conveyance"* of undivided interests had been made to the sons.

Culbertson was enabled by reason of these instruments to borrow money without involving the minor children.

The Culbertsons, thereafter, filed tax returns showing their children as partners. In 1943, a revenue agent questioned the validity of the alleged partnership. The Culbertsons, for this reason, caused their children to file a suit against them on February 23, 1944, in a Texas Court, wherein they prayed that the Court declare the above-described instruments void, and for a decree declaring that the alleged partnership was in all things valid. A judgment granting the relief prayed for was entered by the Texas Court on February 26, 1944.

When the Tax Court was called for the first time to determine whether or not there existed a valid partnership between Mr. and Mrs. Culbertson and their children, it resolved the issue against the Culbertsons on the basis of a conflict in the evidence. The Culbertsons claimed that the true agreement between them and their children was the oral agreement which preceded the execution of the instruments used for the purpose of borrowing money. The Tax Court refused to believe that Mr. Culbertson would misrepresent the true facts to the manager of the lending institution and on this basis determined that the aforementioned instruments evidenced the true agreement between the Culbertsons and their children. Since these instruments by their terms described the conveyances to the children as *"conditional"* the Tax Court, in making its decision, stated:

> "By these instruments it appears that the boys (and daughter) are to acquire an interest in the business in the *future,* and we cannot pass them

> off lightly as does petitioner on brief." (Emphasis by the Tax Court.)
>
> *Culbertson v. Commissioner,* supra, 6 TCM 700.

To the above quotation, the Tax Court added the following significant statement:

> "Moreover, the fact that at the time of the Trial the boys were not, with the exception of W. O., Jr., (and perhaps Richard—'Richard has some lately'), taking part in the operation of the ranch, is hardly consistent with the petitioner's contention or the idea that Coon thought Culbertson could not operate the business."

The Tax Court, in its opinion, which is a long one, took occasion to discuss the fact that the Culbertson children had not contributed services or capital originating with them, but it should be noted that its decision invalidating the alleged partnership was not based on the failure to render services or to contribute original capital, but on the instruments which show that the children were not the "true owners" of the capital contributed to the alleged partnership because of the conditional nature of the conveyances.

The Culbertsons, after the decision of the Tax Court, filed a petition for review in the Court of Appeals for the Fifth Circuit. The Court of Appeals on review reversed the decision of the Tax Court (*Culbertson v. Commissioner* (1948), 168 F. (2d) 979). The Court of Appeals in so reversing the Tax Court took a different view of the case and decided that the instruments that had decided the issue against the Culbertsons were executed by them without knowl-

edge of their legal effect. This might have been sufficient to justify the reversal of the Tax Court's decision. However, the Court of Appeals went further than the necessities of the case required and stated, by way of dictum, that it was not necessary to the validity of a partnership that the partners contribute presently either services or capital. The Court of Appeals stated its point as follows:

> "Neither statute, common sense, nor impelling precedent requires the holding that a partner must contribute capital or render services to the partnership prior to the time he is taken into it. These tests are equally effective whether the capital and the services are presently contributed and rendered or are later to be contributed or to be rendered."
>
> *Commissioner v. Culbertson,* supra, 168 F. (2d) 983.

The above rather extraordinary statement no doubt influenced the Supreme Court to grant certiorari on petition of the Commissioner.

The Supreme Court, in reviewing the decision of the Court of Appeals, immediately took issue with the above-quoted statement and said:

> "If it is conceded that some of the partners contributed neither capital nor services to the partnership during the tax year in question, as the Court of Appeals was apparently willing to do in the present case, it can hardly be contended that they are in any way responsible for the production of income during those years. * * *
>
> "The intent to provide money, goods, labor, or skill some time in the future cannot meet the de-

mands of §§ 11 and 22(a) of the Code that he who presently earns the income through his own labor and skill and the utilization of his own capital be taxed therefor. The vagaries of human experience preclude reliance upon good faith, intent as to future conduct as a basis for the present taxation of income."

Commissioner v. Culbertson, supra, 337 U.S. 739-740, 93 L. Ed. 1664.

After having so admonished the Court of Appeals, the Supreme Court went on to tell the Tax Court that it too was in error when it resolved the issue of the validity of a partnership by applying the "vital services—original capital" test. In so doing, the Supreme Court said:

"We turn next to a consideration of the Tax Court's approach to the family partnership problem. It treated as essential to membership in a family partnership for tax purposes the contribution of either 'vital services' or 'original capital'. Use of these 'tests' of partnership indicates, at best, an error in emphasis. It ignores what we said is the ultimate question for decision, namely, 'whether the partnership is real within the meaning of the Federal Revenue Laws' and makes decisive what we described as 'circumstances' (to be taken) 'into consideration' in making that determination."

Commissioner v. Culbertson, supra, 337 U.S. 741, 93 L. Ed. 1665.

The foregoing makes it clear that the Supreme Court rejected the extreme views expressed both by

the Court of Appeals and by the Tax Court. In another portion of its opinion the Supreme Court set forth for the future guidance of the Tax Court the correct rule for decision.

Nowhere in the Tax Court's opinion or in the opinion of this Court is there any reference to this rule. The Tax Court quoted only such parts of the Supreme Court's opinion in *Culbertson* as still bear some resemblance to the old "vital services—original capital" test. The Supreme Court made it very clear that the burden, heavy as it might be, of proving the bona fides of a partnership arrangement could be carried by showing that the members of the family partnership had either rendered services or had made contributions of capital of which they were the true owners. In remanding the *Culbertson* case to the Tax Court, the Supreme Court expressed this rule as follows:

> "The cause must therefore be remanded to the Tax Court for a decision as to which, if any, of respondent's sons were partners with him in the operation of the ranch during 1940 and 1941. As to which of them, in other words, was there a bona fide intent that they be partners in the conduct of the cattle business, either because of services to be performed during those years, *or because of contributions of capital of which they were the true owners,* as we have defined that term in the *Clifford, Horst* and *Tower* cases?"

Commissioner v. Culbertson, 337 U.S. 748, 93 L. Ed. 1668.

The point that stands out in the Tax Court's decision is the fact that it at no time *found* that petitioner's children were not the "true owners" of the capital contributed by them to the partnership. In its opinion it makes many statements with reference to the dominion and control that Harkness, Sr., exercised over the business of the partnership during the years in which the young men were in the Army. These, however, *are not findings.* They are merely erroneous expressions of opinion contrary to its findings of fact. In addition, the Tax Court's opinion contains nothing which indicates that it applied the definitions set forth in the *Clifford, Horst* and *Tower* cases to either its findings of fact or the record as a whole for the purpose of determining whether or not petitioners' children were or were not the true owners of the capital contributed by them.

The record herein and the Tax Court's own findings are such that the Tax Court could not, in endeavoring to affirm the decisions of the respondent, apply the mandate of the Supreme Court, and for this reason the Tax Court resorted to the device of attempting to compress the record herein into the "future plan—condition precedent" mold of the first *Culbertson* decision.

In our opening brief, we pointed out that the ultimate finding on "intent" of the Tax Court was not supported by substantial evidence because neither the record nor the findings of the Tax Court established that petitioners' children were not "true owners" of the capital (Brief for Petitioners, pp. 17; 34; 41-46).

It is respectfully urged, therefore, that this Court was led by the device employed by the Tax Court to overlook the fact that the Tax Court had not made any finding on the issue of ownership. This Court, for the same reason, failed to review the record for the purpose of determining whether the ultimate finding of the Tax Court with respect to "intent" was supported by substantial evidence.

II.

IN AFFIRMING THE DECISION OF THE TAX COURT, THIS COURT HAS OVERLOOKED THE CORRECT MEANING OF THE TERM "BONA FIDE"; IT HAS LIKEWISE OVERLOOKED THE PRESUMPTION OF GOOD FAITH AND HAS OVERLOOKED THE RULE WHICH REQUIRES THE TAX COURT NOT TO REJECT UNCONTRADICTED AND UNIMPEACHED EVIDENCE.

It pointed out to both the Tax Court and this Court that there was no conflict in the record; that all the evidence was adduced by the petitioners and that the respondent had produced no evidence to overcome petitioners' case. It was also pointed out that the "presumption of law" in favor of respondent's determination of deficiencies had been overcome and that there was nothing in the record that overcame the presumption of good faith which accompanied the petitioners and their children throughout the proceedings (Petitioners' Opening Brief pp. 31-34). It was shown too that the inferences which the Tax Court drew from the uncontradicted record were erroneous and were supported only by the equally erroneous assumption that the powers of management vested in Harkness,

Sr., had not been exercised by him as an agent or fiduciary, but as an owner. It was shown, moreover, that this erroneous assumption resulted from the Tax Court's failure to give effect to the intent and good faith of the parties (Petitioners' Opening Brief pp. 58-75).

It is apparent to us from the opinion of this Court that petitioners' contentions above summarized were entirely overlooked. We believe this occurred because this Court, as well as the Tax Court, had adopted herein an erroneous definition of the term "good faith".

This Court ruled that the Tax Court found a *good faith* intent to form a partnership in the *future* and that there was not a *bona fide* intent to form a partnership in the present, that is to say, in the year 1943. This Court also ruled that these ultimate findings were supported by the record. We contend that these rulings ignore the correct meaning of the term "bona fide".

At a very early date, the Supreme Court of the United States defined this term as follows:

> "*Bona fide* is a legal, technical expression and the law of Great Britain and this Country has annexed a certain idea to it. It is a term used in statutes in England, and in acts of assembly of all the states, and signifies a thing done really, with a good faith, without fraud, or deceit, or collusion or trust."
>
> *Ware v. Hylton* (1796), 3 U.S. (3 Dall.) 196, 241, 1 L. Ed. 568, 586.

The converse of the term is bad faith, deceit, etc., and it will be noted that it contains none of the elements of *frustration* or *impossibility.*

It is clear, therefore, that if this Court and the Tax Court hold that petitioners and their children were not bona fide partners in 1943, within the correct definition of the term, then this Court and the Tax Court have plainly said that petitioners and their children entered into a fraudulent scheme designed to deceive the tax collector, and they have likewise said that the solemn agreements and conveyances between the parties were merely the means whereby the scheme was to be executed.

It is hard to believe that this Court and the Tax Court could have had the correct definition in mind because it can be gathered from what appears in the opinions that both Courts concede that petitioners' evidence has the "flavor of truth".

The Tax Court found that many legitimate business reasons dictated the decision to form the partnership. It found also that a decline in profits in the fruit packing business was anticipated, and that, in the formation of the partnership, the tax saving possibilities were only a secondary consideration (R. 253-254; 255-256). And speaking of the record, as a whole, the Tax Court said:

> "* * * some of the evidence is indicative of a valid family partnership * * *." (R. 274.)

This Court, after having considered the record, said:

> "* * * the evidence leaves little room for doubt that Harkness, Sr. had determined that ultimately there should be a partnership including the children."

And in appraising the findings and opinion of the Tax Court, this Court stated:

> "The Tax Court expressed no doubt of a good faith intent to create a partnership at *some time.*"

In addition, if our memories serve us correctly, Counsel for respondent at the oral argument conceded that petitioners' witnesses had testified truthfully and that the parties had acted in good faith. His contention was that the good faith purpose of the parties had in some fashion been frustrated or defeated.

But assuming, nevertheless, that this Court had the correct meaning of the term in mind, then we submit that the tenuous inference drawn from the powers of management vested in Harkness, Sr., was insufficient to overcome the presumption of good faith. The law presumes that the business transactions of every man are done in good faith and for an honest purpose; and anyone who alleges that such acts are done in bad faith, and for a dishonest and fraudulent purpose, has the burden of showing the same. Fraud or bad faith is never presumed, but must be established by *clear, unequivocal and convincing proof. Proof which merely creates a suspicion is not enough.*

> *U. S. v. California Midway Oil Co.* (D.C.S.D., Calif., 1919), 259 Fed. 343, 352, 353;

Jones, Commentaries on Evidence, Vol. 1, Sec. 13, pp. 99-100.

It is respectfully submitted that the inference drawn from the control of Harkness, Sr., over the business in 1943, is so weak as to amount to a suspicion, and does not amount to clear, unequivocal and convincing evidence sufficient to prove fraud. It is therefore respectfully urged that if the Court intended to use the term "bona fide" in its correct sense, it overlooked the presumption of good faith which accompanied the parties throughout these proceedings and which could not be overcome by the alleged inference drawn by the Tax Court.

We submit also that if this Court and the Tax Court really mean that the arrangement between the parties was a child of iniquity, there is a basic inconsistency between this holding and the ruling that the parties were in good faith with respect to the future. Why should the fact that the young men rendered services in subsequent years be the purifying agent that transforms a fraudulent transaction into an honest arrangement? Why could it not be said with equal logic that the young men are in reality only supervisory employees who are paid large salaries in the guise of partnership profits, and that they hold their undivided interests in the properties subject to a secret trust for the benefit of petitioners?

Frankly, we do not believe that this Court and the Tax Court meant to place the badge of fraud upon the transactions between petitioners and their

children. We believe that there was a confusion in terms; that this Court, as well as the Tax Court, found no bona fide intent only in the sense that a transaction intended to be in good faith was frustrated and defeated because the children could not work or personally exercise control over their property during the year 1943. We likewise believe that this confusion in terms results from not considering the intent of the parties as expressed in the record and from attempting to resolve the issue as to the reality of the partnership by applying the discredited "vital services-original capital" test.

Moreover, we believe that this confusion in terms caused this Court to overlook the rule which forbids the Tax Court to disregard uncontradicted evidence, particularly, when the Tax Court concedes that the testimony has "the flavor of truth", and has said nothing which would cast any doubt upon the veracity of the witnesses.

In the case of *Mayson Mfg. Co. v. Commissioner* (C.A. 6-1949), 178 F. (2d) 115, 121-122, the rule was stated as follows:

> "We recognize that in the present case petitioner's evidence on the issue was not from impartial witnesses. *But, nevertheless, it was uncontradicted and was not referred to in the opinion of the Tax Court as being unworthy of belief. Under such circumstances, the failure of the Commissioner to introduce testimony supporting the deductions made by him lends considerable support to our view, gathered from other undis-*

puted facts in the case, that the findings of the Tax Court on the issues involved are clearly erroneous and should be set aside." (Emphasis supplied.)

The rule is likewise well expressed in *Lawton v. Commissioner* (C.C.A. 6-1947), 164 F. (2d) 380, 384 as follows:

> "We are aware, of course, that the Tax Court is not required, at all events, to believe the testimony of witnesses, or even to accept at face value documents offered in evidence, but it appears to be well settled that the fact finder *may not arbitrarily disregard undisputed and uncontradicted testimony of unimpeached persons where he has already found facts which lend a flavor of truthfulness to their assertions.*" (Emphasis supplied.)

In connection with the foregoing rule, we call attention to the comment which this Court made in its opinion with respect to the evidence relating to the years after 1943. This Court said:

> "Since it was as likely to show an intent respecting future conduct as one for a present enterprise, there was no occasion for the Court to make findings thereon."

We gather from the Court's comment that the Court was not of the opinion that this evidence gave rise to conflicting inferences which cancelled each other, but that the Court felt that at worst this evidence was ambiguous. We submit therefore that since

the record as a whole is uncontradicted and possesses the flavor of truth, this ambiguity should have been resolved in favor of petitioners and not in favor of respondent. If this seeming ambiguity is resolved in favor of petitioners, as it should be, then there is no substantial evidence to support the findings of the Tax Court that petitioners and their children were not bona fide partners in 1943.

It is respectfully submitted that, for the reasons above set forth, a rehearing should be granted in these causes.

Dated, San Francisco, California,
January 25, 1952.

Respectfully submitted,
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IRVING ROVENS,
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Certificate of Counsel.

I hereby certify that I am of counsed for petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 25, 1952.

Philip S. Ehrlich,
Of Counsel for Petitioners.